No. 96-1133

In the SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED STATES OF AMERICA, *Petitioner,*

v.

EDWARD G. SCHEFFER, *Respondent.*

On Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF *AMICUS CURIAE* OF UNITED STATES NAVY-MARINE CORPS APPELLATE DEFENSE DIVISION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Military Rule of Evidence 707, which provides that evidence of a polygraph examination is not admissible in court-martial proceedings, is an unconstitutional abridgment of Airman Scheffer's right to present reliable and relevant evidence in his defense?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution:

Statutes and Rules:

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INTEREST OF THE *AMICUS CURIAE*

The United States Navy-Marine Corps Appellate Defense Division represents convicted Navy and Marine Corps servicemembers during the appellate review of their courts-martial. Moreover, *Amicus* acts as a de facto advocate for the Navy trial defense bar.

The Court of Appeals for the Armed Forces' decision in this case is binding on all courts-martial in the Navy and the Marine Corps. As a result, the Court's affirmance or reversal of the lower court's decision will directly impact the ability of Navy and Marine Corps servicemembers -- our

current and future clients -- to defend themselves at courts-martial.[1]

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Armed Forces is a specialized court that is well-equipped to address matters in military justice. It was created to protect the rights of servicemembers, while at the same ensuring military discipline. Unlike other federal courts, the lower court does not need to show deference to the decisions of the President in matters of military justice. It can evaluate the decisions of the President, as this Court evaluates a decision of a state court in constitutional law, because of its congressional mandate and its specialized knowledge.

In order to resolve the constitutional issue in this case, a court must undertake an analysis of the military's interests, as well as the constitutional principles. Since there is no court better than the lower court to analyze the military's interests in matters of military justice, the Court should show deference to the lower court's decision. The lower court's decision is reasonable in that it permits polygraph evidence only when the evidence is reliable and relevant, the necessary requirements for admissible evidence. Moreover, the court considered the President's interests, in reaching its decision.

Additionally, even under a *de novo* review, the lower court's decision is correct. The Compulsory Process Clause requires that legitimate government interests must justify the *per se* exclusion of exculpatory evidence. In this case, the President's interests do not justify this *per se* exclusion. All of the President's interests can be served by an application of the other military rules of evidence he has promulgated:

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[1] As required by Rule 37 of the Court's rules, *Amicus* has filed both parties' consent to the filing of this brief with the Clerk.

Military Rules of Evidence 403 and 702. The military judge can, on a case-by-case basis, achieve the President's interests, while at the same time, permit an accused to defend himself at a court-martial with reliable and relevant evidence in his case.

ARGUMENT

I. THE COURT OF APPEALS FOR THE ARMED FORCES PROPERLY USED ITS EXPERTISE IN MILITARY JUSTICE.

A. Congress created the Court of Appeals for the Armed Forces to be a specialized court that would provide proper review of courts-martial.

Military courts-martial historically have had limited review. The court-martial itself gives a recommendation to the person who convened it. W. Winthrop, *Military Law and Precedents* 447 (1920 edition). The convening authority then must approve the sentence, or in other words, must officially accept and concur in the court-martial proceedings. *Id.* at 448. This has always been the first level of review. However, the ability to execute the sentence, i.e. to actually impose the sentence, has at times required further review.

Congress required that no sentence of a general court-martial could be executed until a report had been made to the general or commander-in-chief of the U.S. forces, or to Congress. American Articles of War 1776, § XIV, art. 8.[2] In 1786, for the first time, Congress required that certain courts-martial be reviewed by it: specifically, no sentence imposed on a general officer, or, in time of peace, no

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[2] All of the following statutes in this paragraph are reprinted in Winthrop, *Military Law*.

sentence of death or dismissal[3], could be executed until submitted to Congress. American Articles (of 1786), art. 2. Otherwise, the officer who convened the court-martial could execute the sentence. In 1806, Congress removed itself completely from this review and transferred its former role to the President. American Articles of War of 1806, art. 65. By 1874, the President maintained the same right to review a sentence before it could be executed. American Articles of War of 1874, art. 105, 106, 108. However, any death sentence or dismissal during time of war was now required to be submitted to the commanding general in the field, or commander of the department, before the sentence could be executed, instead of simply to the officer who convened the court-martial. Articles of War of 1874, art. 105, 107.

This system remained in effect until 1920. Then, the first military "appellate court" was created for the Army. Articles of War, ch. 227, 41 Stat. 787, 797-799 (1920). It was a board of review that consisted of three judge advocate officers. The board reviewed those cases in which the President was previously required to review before the sentence could be executed, as well as those cases from a general court-martial where the accused had been sentenced to death, dismissal, dishonorable discharge, or confinement in the penitentiary. *Id.* The board could, with the agreement of the Judge Advocate General, set aside the actions of the court-martial, and require a rehearing. If the Judge Advocate General disagreed with the board as to the proper resolution of the case, the matter was forwarded to the President for final decision. *Id.* If the board affirmed the findings and sentence, and the Judge Advocate General agreed, the sentence could then be executed. *Id.*

In 1948, the Judicial Council, consisting of three general officers, was created within the Army Judge Advocate General's office. This council was to act as

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[3] A dismissal is the dishonorable discharge of an officer.

another level of review before a sentence could be executed. However, even under this statute, it appeared that if the Judge Advocate General disagreed with the decision of the Judicial Council, the President would make the final decision. Selective Service Act of 1948, ch. 625, § 226, 62 Stat. 604 (1948).

In the Navy, in 1800, general courts-martial could be executed by the authority convening them, unless the sentence was to death or dismissal. In the case of a sentence to death from a trial in the United States, or a sentence to a dismissal, presidential action was required; in the case of a sentence of death adjudged outside the United States, action by the commander of the fleet or squadron was required. Rules and Regulations for the Government of the Navy, ch. XXXIII, § 1, art. XLI, 2 Stat. 45, 51 (1800). Later, Congress required all death sentences to be executed by the President, but otherwise maintained the same level of review. Articles for the Government of the Navy, ch. CCIV, art. 19, 12 Stat. 600, 605 (1862). This would be the only review authorized in the Navy until the enactment of the Uniform Code of Military Justice. Revised Statutes 1873-1875, Title XV, ch. 10, § 1624, art. 53; H. Rep. No. 491, 81st Cong., 1st Sess. (1949), *reprinted in Index and Legislative History, Uniform Code of Military Justice* at 64-76 (1950) (articles governing Navy before the Code).

There are two very important facts that are apparent from this history of court-martial review: first, there was never a review by an independent "court"; second, the review that did exist was always controlled by military officers or the President as the Commander-in-Chief.

Congress noted the defects, and attempted to correct them by enacting Article 67 of the Uniform Code of Military Justice. In introducing the Uniform Code of Military Justice to the House of Representatives, Congressman Brooks noted:

> Article 67 contains the most revolutionary changes which have been incorporated into our military law. Under existing law all appellate review is conducted solely within the military departments. This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly matters involving military justice. Every Member of Congress, both present and past, is well aware of the validity of this statement.

95 Cong. Rec. 5718 (1949).

Article 67 created the Court of Military Appeals (now the Court of Appeals for the Armed Forces), which would consist of three (now five) civilian judges who would serve for fifteen years and could be removed only for cause. The court would be of limited jurisdiction reviewing only certain courts-martial. Congress had created a specialized court under its Article I authority to review courts-martial -- something which, in the prior history of military justice, had never existed. Congress "chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd v. Bond*, 395 U.S. 683, 694 (1969).

Moreover, Congress had created a civilian judicial body whose decisions were binding and not subject to further review. Congress had removed the authority of final decision in courts-martial from the President and his subordinates, and instead placed it in an independent civilian court. For the first time, Congress had placed a civilian body (other than itself) above the decisions of the President in military justice matters. Presumably, Congress did so

because it was confident that the court would protect the balance between the servicemembers' rights and the military's need for discipline better than its predecessors (the President and the military) had for the previous 175 years.

B. The Court of Appeals for the Armed Forces does not have to defer to the President in matters of military justice.

The Court routinely shows deference to the actions of Congress in matters of military justice. *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality) (Congress entrusted with task of balancing rights of servicemembers and demands of discipline and duty); *Solorio v. United States*, 483 U.S. 435, 447 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military"). It has extended this preferential scope of review to those acting in military matters under the authority delegated by Congress. *See Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (limited review of decisions of Air Force officials in matters of military uniform regulations). In this case, the Government complains that the lower court failed to show deference to the decision of the President in barring the use of polygraph evidence at courts-martial. Brief for the United States 39-43. *Amicus* asserts that the Court of Appeals for the Armed Forces does not have to show this deference to the President.

The Court reduces its scrutiny of Congress in matters of the military because the Constitution gives Congress "broad constitutional power to raise and regulate armies and navies." *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981) (citation omitted). Moreover, there is a practical reason as well. "[C]ourts are ill equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the

judiciary is trained to deal." E. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962), *cited in part in Goldman*, 475 U.S. at 507. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (it is difficult to conceive of an area of governmental activity in which the courts have less competence).

However, the Court of Appeals for the Armed Forces does not need to show special consideration to the military (even though this Court might) for two reasons. First, the lower court has been entrusted with the supervision of military justice by Congress under its constitutional authority to make rules for the regulations of the armed forces. Thus, the lower court was acting under the same authority of Congress as the President was, when he promulgated Military Rule of Evidence 707.[4] In fact, the history of appellate review makes clear that the lower court was created because the previous system was deficient. Congress entrusted military justice decisions to the lower court. As a result, there is no intrusion on Congress' constitutional powers in military matters when the lower court shows no deference to the decisions of the President.

Not only is there no constitutional bar to the lower

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[4] The President exercised his statutory authority to promulgate the rule of evidence. "The Congress shall have the power * * * To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Congress exercised this authority by promulgating, among other rules, Article 36, Uniform Code of Military Justice, which permits trial procedures to be prescribed by the President. Whether the President has inherent authority to promulgate rules of evidence is not at issue in this case. *See Loving v. United States*, 116 S. Ct. 1737, 1751 (1996) (Court did not address whether President had inherent authority to prescribe aggravating factors, when Congress had delegated this authority to him). Once Congress enacts a statute addressing his authority to issue rules, it has preempted any inherent rights the President may have. As a result, the President's resulting actions derive from congressional authority. *Id.*

court's stricter review, but also, the review conforms to congressional intent. The lower court, unlike every other federal court, was created as a specialized court in areas of military justice. In its forty-seven years of existence, dealing with thousands of courts-martial, year after year, it has gained a wealth of knowledge and expertise in areas of military justice. The Court of Appeals for the Armed Forces is "well-equipped" to address military matters on a parallel level with the President, unlike this and other federal courts. As a result, the lower court does not need to show special consideration to the President.

C. Congress intended the Court of Appeals for the Armed Forces' decisions to have greater weight than the President's in issues of constitutional law that are intertwined with issues of military justice.

The question as to the type of review that this Court should conduct in this case is complex. Normally, in areas of non-constitutional military justice, it is expected that the lower court would "remain the primary source of judicial authority under the Uniform Code of Military Justice." H. Rep. 98-459, 98th Cong., 1st Sess. 17 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2177, 2182. It would be expected that the Court would not overrule the lower court on purely military justice matters "save in exceptional situations where egregious error has been committed." *Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974) (citations omitted) (Court discusses scope of review for highest District of Columbia court, an article I court with direct review by the Supreme Court). *See* B. Boskey and E. Gressman, *The Supreme Court's New Certiorari Jurisdiction over Military Appeals*, 102 F.R.D. 329, 332-33 (1984) (in reviewing military justice, Court may follow model it established for District of Columbia Court of Appeals).

Naturally, however, when the Court reviews a lower court's decision on a constitutional issue, it reviews the decision *de novo*, because no court is more qualified to address constitutional issues than it. In fact, the Court has done so in every military case that has been directly reviewed by it. In *Solorio*, 483 U.S. 435, the Court revisited its own decision, and thus had no need to rely on a decision of the lower court. In *Davis v. United States*, 512 U.S. 452 (1994), and *Loving v. United States*, 116 S. Ct. 1737 (1996), there was no argument by the Government that a different rule applied in the military, and as a result, the Court was able to treat the issues as if they had arisen in a non-military context. Finally, *Weiss v. United States*, 510 U.S. 163 (1994), *Ryder v. United States*, 515 U.S. 177 (1995), and *Edmond v. United States*, 117 S. Ct. 1573 (1997), all involved the issue of the Appointments Clause, a provision that applies equally to the military. It is clear that "the expertise of military courts [had not] extended to the consideration of constitutional claims" in the above cases, *Noyd*, 395 U.S. at 696 n.8, and as a result, the Court reviewed the military court's decisions as it would have reviewed other court's decisions.

This case, however, is different. *Amicus* asserts the issue in this case is a "hybrid" constitutional issue. On the one hand, the issue is a constitutional one because the lower court based its decision on the Compulsory Process Clause of the Sixth Amendment. In resolving this type of issue, the Court has examined the interests of the State and whether those interests justify the exclusion. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Montana v. Eglehoff*, 116 S. Ct. 2013, 2029 (1996) (O'Connor, J. dissenting). On the other hand, in order for this Court to determine whether the President's interests justify the exclusion, it must examine the interests and his justification for the rule in a military context. This is a task which the Court is ill-equipped to perform -- it does not have the knowledge to know if the

President is correct because of the intricacies of military discipline and courts-martial. However, this is a task well-suited for the Court of Appeals for the Armed Forces, and no court would have more expertise in this area.

When addressing whether due process required counsel at a summary court-martial, after the Court of Military Appeals had found such a requirement, the Court noted that "[d]ealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference." *Middendorf v. Henry*, 425 U.S. 25, 43 (1976). This was so, even though the issue was a constitutional one. As the Court implicitly recognized, the constitutional issue in *Middendorf* was interwoven with the military's interests, and as a result, the lower court's decision was important. The Court could not determine whether a summary court-martial required counsel without first determining what effects supplying counsel would have on the military interests. In that case, however, the Court did not rely on the Court of Military Appeals' decision, because only two judges (at the time the court was composed of three judges) addressed the claim of military necessity and their responses conflicted. *Id.* at 44. In this case, however, the majority of three judges rejected the claim of military necessity. Moreover, Judge Sullivan, dissented below because he believed that the evidence was not relevant -- and not because military necessity required the exclusion of it. *United States v. Williams*, 43 M.J. 348, 356-57 (1995) (Sullivan, C.J., concurring). Thus, this case involves an appropriate constitutional issue in which the Court should show deference to the lower court's judgment.

Practically, the question then becomes how does the Court show special consideration both to the decision of the President in promulgating this rule under his delegated authority from Congress, and to the lower court in striking down the rule under its delegated authority as the supervisor of military justice. This is the problem that was avoided in

Middendorf, but is present in this case.

Amicus proposes that this Court rely on the lower court's judgment instead of the President's because this would comply with congressional intent. As noted above, historically, the President was responsible for military justice, with no review other than through him. Winthrop, *Military Law* 53 (historically the only appeal was through the President or other superior executive authority). Congress, in creating the lower court, superseded the President's and military's ability to review courts-martial. This was a conscious congressional decision to take power from one group -- the President and his military officers[5] -- and give it to a new group -- the Court of Appeals for the Armed Forces. The lower court was to protect an accused's rights and ensure a fair court-martial process. In a case such as this, where the lower court has made an effort to protect a military servicemember's right to defend himself, the lower court's view should carry more weight with the Court than the President's.

Finally, this reliance on the lower court's decision does not eviscerate Congress' intent in making the lower court's decisions subject to direct review by the Court. The Court does not "abdicate [its] ultimate responsibility to decide the constitutional question" by doing so, but instead recognizes that Congress itself requires such deference to the lower court's actions. *Rostker*, 453 U.S. at 67.

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[5] Congress did leave some further mitigating power in the other officers. Article 73, U.C.M.J. (Judge Advocate General may grant new trial under some circumstances); Article 74, U.C.M.J. (service Secretary may suspend or remit unexecuted portions of sentence). Obviously, the President maintains his constitutional authority to pardon.

D. The Court of Appeals for the Armed Forces' decision was reasonable, despite the President's *per se* exclusion of exculpatory evidence.

Even under this scope of review, the Court must examine whether the decision of the lower court was reasonable. It was. The court realized that all of the President's concerns in excluding this evidence would be met by military judges and military court-martial members. Its knowledge and confidence in the court-martial parties should be affirmed.

1. The lower court carefully considered this decision.

The lower court had considered the admissibility of polygraph evidence for almost ten years before it issued the decision in this case. In *United States v. Gipson*, 24 M.J. 246 (C.M.A. 1987), the court first announced that polygraph evidence might be admissible at courts-martial, if a proper foundation for the evidence could be laid. In 1991, in response to the *Gipson* decision, the President promulgated Military Rule of Evidence 707. Two years later, the court noted the possible constitutional defects in the rule. *United States v. Rodriguez*, 37 M.J. 448, 451-52 n.2 (C.M.A. 1993) (opinion of Wiss, J.). Two years after that, it overruled the Army appellate court's decision holding the President's rule unconstitutional, because the polygraph evidence was not relevant when the accused did not testify. *United States v. Williams*, 43 M.J. 348 (1995). Finally, in this case, the court struck down the rule, if the evidence would be admissible under the standards for other scientific evidence. The lower court showed no haste in striking the President's rule, but instead, did so only after a careful consideration of the issue.

2. The lower court ensured that the evidence is relevant and reliable.

Second, the court permits this evidence only if it is relevant and reliable in this case -- the basic principles of admissibility for all evidence. An accused must testify, and his credibility must be attacked, before exculpatory polygraph evidence may be admitted. The polygraph examiner can only testify that the accused's prior responses to certain questions showed no deception. The relevancy of this evidence is consistent with other types of evidence that are routinely admitted against an accused. *United States v. Cacy*, 43 M.J. 214, 218 (1995) (no error to permit expert to testify that victim's accusation did not appear rehearsed); *United States v. Suarez*, 35 M.J. 374, 376 (C.M.A. 1992) (expert permitted to testify that counter-intuitive conduct not necessarily inconsistent with truthful accusation).

Additionally, the lower court permits the evidence only if it meets the standards of admissibility for other types of scientific evidence. This ensures a consistent response to this and other scientific evidence in military courts-martial. The lower court has not lessened the standard of reliability for polygraph evidence, but instead allows an accused to establish that his evidence is in fact reliable. If the evidence is not reliable, it will not be admitted. This is a reasonable response to this issue, balancing an accused's right to present a defense and the President's interests in only permitting reliable evidence before courts-martial.

3. The lower court considered the President's interests in excluding the evidence.

Finally, the court did not blindly ignore the President's interests in this case. Judge Gierke (with Chief Judge Cox and former Chief Judge Everett concurring) acknowledged the President's interests, but also noted that

the argument was speculative at this point, and that the military did not appear to suffer any consequences after the *Gipson* decision (after which, polygraph evidence was no longer *per se* inadmissible for four years). Finally, and most important, speaking as the court that was created to ensure the rights of servicemembers, it stated that "our measure should be the scales of justice, not the cash register." The Court of Appeals for the Armed Forces' decision was a proper and reasonable one. In striking the provision, the court accomplished what Congress intended for it to do -- use its specialized knowledge to supervise military justice. As a result, its decision should be affirmed.

II. A *PER SE* EXCLUSION OF POLYGRAPH EVIDENCE VIOLATES THE SIXTH AMENDMENT.[6]

If this Court reviews this constitutional issue under the same standard of review it would had the case arose from a state or federal court, *Amicus* asserts nonetheless that the President's rule is unconstitutional.

A. Legitimate government interests must justify the *per se* exclusion of exculpatory evidence.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). This guarantee is protected, in part, by the Compulsory Process Clause of the Sixth Amendment. The clause provides "[t]he right to offer testimony of witnesses, and to compel their attendance, if necessary," in order to "present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967).

On several occasions, the Court has ruled on whether a State's *per se* exclusion of evidence violates this right to present a defense. While the Court has never announced a single test to determine whether the exclusion violates the Compulsory Process Clause, *Amicus* asserts that one can be

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[6] While the Court has never held that the Sixth Amendment applies to the military, *Davis*, 512 U.S. at 457 n.*, neither the Government nor the dissenters below challenged its application. *See United States v. Williams*, 43 M.J. 348, 356 (1995) (Sullivan, C.J., concurring) (Sixth Amendment applies to the military; however polygraph evidence not relevant).

distilled from its decisions[7]:

> Legitimate government interests must justify the *per se* exclusion of exculpatory evidence.

Crane, 476 U.S. at 690. If the interests do not, then the exclusion is unconstitutional.

The reviewing court must make a "close examination" of the issue. *Montana v. Eglehoff*, 116 S. Ct. 2013, 2029 (1996) (O'Connor, J. dissenting) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)[8]). While this term in the context of the Sixth Amendment has never been precisely defined, the same term has been used to describe the level of scrutiny for a race-based classification or an intrusion into the family relationship by the legislature. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion); *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 564 (1996). Thus, the Court must not

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[7] Some of the cases were decided on the basis of the Due Process Clause instead of the Compulsory Clause. *Amicus* contends that the provisions provide the identical protection in this area of law. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (Court concluded that compulsory process provided no greater protection than due process, and avoided deciding whether the protections differ).

[8] *Chambers* addressed both the Confrontation Clause and Compulsory Process Clause. While the quoted language from *Chambers* arose from the discussion of the Confrontation Clause, the Court later closely examined the State's interests in addressing the Compulsory Process Clause issue as well. *See also* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567, 628 (1978) ("whatever the balance is struck between the interests of the defendant and the interest of the state, the outcome should be identical whether the accused's sixth amendment claim arises in the context of his right to be confronted with the witnesses against him or his right to obtain witnesses in his favor").

determine whether the President's decision was reasonable[9], but instead whether it was necessary to serve his interests.

There must be a legitimate government interest in excluding the evidence. *Michigan v. Lucas*, 500 U.S. 145, 149 (1991); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Chambers*, 410 U.S. at 295. *See also Eglehoff*, 116 S. Ct. at 2029 (O'Connor, dissenting) (State does not have legitimate interest in promulgating rule of evidence in order to alleviate its burden of proof). Finally, this interest must justify the exclusion of the evidence. *Lucas*, 500 U.S. at 151; *Crane*, 476 U.S. at 691 (State offered no rational justification for exclusion of evidence concerning circumstances surrounding the taking of a confession).

B. The drafter's interests do not justify this *per se* exclusion of evidence.

The drafters of Military Rule of Evidence 707 offer several interests as a basis for the exclusion of polygraph evidence: First, the court members will be misled by polygraph evidence and accept the evidence as unimpeachable or conclusive. Analysis of Military Rule of Evidence 707 at A22-48, Manual for Courts-Martial (1995 edition). Second, there will be a danger of confusion of the issues, where the members will focus more on determining the validity of the test rather than the guilt or innocence of an accused. *Id.* Third, polygraph evidence will result in a waste of time because the reliability of the test and the qualifications of an expert must be litigated in each case. *Id.* Fourth, the reliability of the test has not been sufficiently established. *Id.* While these interests may be valid, they do

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[9] Despite the Government's argument to the contrary, the standard of review to be applied is strict. Brief for the United States at 35 ("rule *rationally* serves valid interests") (emphasis added).

not justify the *per se* rule.[10]

1. Court-martial members are better qualified than ordinary jurors, and, as a result, will not be misled by polygraph evidence.

In the military, the convening authority (the officer who creates, and sends specific charges to, a court-martial) selects the members for a court-martial. The convening authority is required to select those servicemembers who "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Article 25, Uniform Code of Military Justice.[11] This requirement "ensures that the 'asserted vagaries of juries' found in other criminal justice systems are minimized in the military." *United States v. Carter*, 22 M.J. 771, 776 (A.C.M.R. 1986) (limiting instruction in regard to rape trauma syndrome evidence prevented members from

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[10] The President has given no indication that he was concerned with polygraph evidence intruding on the member's function of assessing credibility, Analysis to Rule 707, notwithstanding the Government's assertion. Brief for the United States at 17, 27-29. In fact, the President permits several types of evidence to assist in a member's credibility determination: Military Rule of Evidence 608(a) (character for truthfulness admissible in order to attack or support credibility); Rule 608(c) (evidence of bias, prejudice, or motive to misrepresent admissible); Rule 609 (prior felony convictions or convictions involving dishonesty admissible). In the one area of credibility in which he has issued a per se rule, Rule 610 (exclusion of religious belief), the drafter's analysis acknowledges that this exclusion may be overcome when critical to the defense. Analysis of the Military Rule of Evidence 610, Manual for Courts-Martial (1995 edition).

[11] When the convening authority selects officer members, as was done in this case, virtually every member will also have a college degree and many will have a postgraduate degree. Moreover, typically, several of the members will have several years of military service.

being overly impressed with expert) (quoting *Schick v. Reed*, 419 U.S. 256, 260 (1974)), *aff'd*, 26 M.J. 428 (1988).

The military rules of evidence themselves acknowledge this superior ability of court-martial members to receive evidence. In contrast to the federal system, there is no military counterpart to Federal Rule of Evidence 704(b)[12]. Court-martial members may hear direct and explicit expert testimony on whether the elements have been met or an offense has occurred. This is because, according to the drafters, the qualifications of the court-martial members reduce the risk that they will be unduly influenced by this evidence, as opposed to civilian jurors. Analysis to Military Rule of Evidence 704, Manual for Courts-Martial (1995 edition).

Every servicemember from his or her initial training is taught to follow and obey orders. This obedience to orders also applies to following a military judge's instructions. *United States v. Hardy*, 46 M.J. 67, 74 (1997) (military personnel are trained to obey the law, including the military judge's instructions, and accept their responsibility to follow those instructions, regardless of their personal beliefs). As a result, there is no justification for this *per se* exclusion of evidence in order to ensure that court-martial members will not be misled. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) (citing *Rock v. Arkansas*, 483 U.S. 44, 61 (1987)). This is especially true for court-martial members.

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[12] "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

2. There is no danger from a confusion of the issues or waste of time, because, if necessary, the military judge already possesses the ability to exclude the evidence.

The drafters were concerned with two polygraph experts testifying against each other about two separately conducted polygraph exams with different results at a court-martial. Additionally, the drafters were concerned with the possibility that it would be time-consuming to determine the reliability of the test and examiner in each case. Even if these are legitimate concerns,[13] this rule is unnecessary. The military judge may exclude relevant evidence when its probative value is substantially outweighed by the danger of confusion of issues or by the considerations of time. Military Rule of Evidence 403. This authority protects the court-martial from "degenerating into a trial of the polygraph machine" and from a waste of time, as feared by the drafters. As a result, the concerns do not justify this rule.

Moreover, in this case, this fear was unwarranted. The polygraph examination was done by the Air Force Office of Special Intelligence [AFOSI]. The prosecution would not need to have another examination done, because their agents, AFOSI, had already completed it. This trial would have consisted of only one polygraph examiner with one set of results, under direct and cross-examination. In this case, there would have been no danger of confusion or a waste of time, and as a result, there is no reason to prohibit Airman Scheffer from presenting his defense in this case.

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[13] *Amicus* does not know of a case in which the Government was prohibited from admitting scientific evidence because it would take too long, or because the defense would then offer its own expert on the scientific evidence.

3. The scientific reliability of the polygraph should be addressed by the trial judge.

As noted by the Government, there is a debate over the scientific reliability of polygraph examinations. Brief for the United States at 18-25. There is a valid governmental interest in excluding unreliable evidence; however, a *per se* exclusion is unnecessary to satisfy this interest for three reasons. *See Rock*, 483 U.S. at 61 (a government's "legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case").

First, Military Rule of Evidence 702 permits scientific evidence to be admitted only if it meets a standard of reliability. *United States v. Nimmer*, 43 M.J. 252 (1995) (in addressing the admissibility of hair analysis to determine drug use, court follows *Daubert* and its requirement of reliability). The military judge is very capable of addressing the reliability of the evidence and making a decision as to its admissibility without the use of the President's *per se* rule of exclusion. Naturally, if he is qualified to rule on the admissibility of other, novel scientific evidence, he clearly is able to rule on evidence upon which there is a large body of law and science. *See United States v. Youngberg*, 43 M.J. 379 (1995) (judge properly admitted DNA evidence even though it was an issue of first impression for the court).

Second, this evidence was taken, in essence, under the authority of the President. The President approves of the polygraph program. The investigative agent who conducted this examination ultimately works for the President, and in conducting the examination he did so under procedures authorized by the Secretary of Defense -- a member of the President's cabinet. Military Rule of Evidence 707 itself, in subsection (b) -- which states that the rule does not bar otherwise admissible statements made during the polygraph examination -- implicitly expects polygraphs to be continued

to be used and to provide helpful information to the government. If the President were truly concerned with the reliability of these examinations, he would not allow its use as extensively as he does. His concerns of reliability are disingenuous and should not hinder Airman Scheffer's right to defend himself.

Finally, this type of evidence, as is true for most types of scientific evidence, is in a constant state of improvement. In 1995, the Director of the Defense Polygraph Institute noted: "The period between 1986 and the present has been one of unparalleled advances in the psychophysiological detection of deception testing procedures and processes." Yankee, *The Current Status of Research in Forensic Psychophysiology and Its Application in the Psychophysiological Detection of Deception*, 40 J. Forensic Sci. 63, 63 (1995), *cited in* 1 P. Giannelli & E. Immwinkelried, *Scientific Evidence* § 8-2(C) (1996 supp.). Moreover, the President's own officers acknowledge that it can assist in the defense of servicemembers. The 1995 Department of Defense Report to Congress indicated that "[t]he polygraph examination process was [] valuable in helping to establish the innocence of persons charged with serious infractions." Department of Defense Polygraph Program, *Annual Polygraph Report to Congress, Fiscal Year 1995*. The President's rule forecloses the ability for later admission of the evidence despite the advances that may occur. This *per se* exclusion -- when it has not been shown that all polygraph evidence is unreliable -- is too broad to justify the governmental interests in this case.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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